1	
2	
3	
4	IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
5	IN AND FOR THE COUNTY OF CHELAN
6	TIMOTHY BORDERS, et al., ) SUPERIOR COURT
7	Petitioners,   No. 05-2-00027-3
8	v. {
9	KING COUNTY, et al.,
10	Respondents, )
11	and )
12	WASHINGTON STATE DEMOCRATIC CENTRAL ) COMMITTEE, )
13	Intervenor-Respondent )
14	, mest vener respondent
15	BEFORE THE HONORABLE JOHN E. BRIDGES
16	BEFORE THE HONORNBEE SOUNDER BRIDGES
17	
18	VERBATIM REPORT OF PROCEEDINGS MOTION TO DISMISS
19	Trial - Day 5 May 27, 2005
20	may 27, 2000
21	Joan M. Snover, CCR/RMR/CRR
22	SNOVER & PARRISH, LLC Professional Court Reporters
23	P. 0. Box 1633 Spokane, Washi ngton 99210
24	(509) 467-0666 Fax (509) 467-3844 E-mail: snoverparrish@comcast.net
25	CCR NO. SNOVEJM387NA / LIC. NO. 2567

1		
2	APPEARANCES:	
3	FOR THE PETITIONER:	DAVIS, WRIGHT & TREMAINE, LLP By: Harry J.F. Korrell
4		Robert Maguire Attorneys At Law
5		2600 Century Square, 1501 Fourth Avenue Seattle, Washington 98101
6		<b>3</b> · · · · · · · · · · · · · · · · · · ·
7		Dale M. Foreman Attorney At Law
8		124A N. Wenatchee Avenue Wenatchee, Washington 98807
9		wenatchee, washington 70007
10	FOR THE INTERVENOR RESPONDENT WASHINGTON	PERKINS COIE, LLP By: Kevin J. Hamilton
11	STATE DEMOCRACTIC CENTRAL COMMITTEE:	By: David J. Burman
12	CENTRAL COMMITTEE:	By: Jenny A. Durkan Attorneys At Law
13		1201 Third Avenue, Suite 4800 Seattle, Washington 98101
14		CDELDEL LAW FLDM
15		SPEIDEL LAW FIRM By: Russell J. Speidel
16		Attorney At Law 7 North Wenatchee Avenue
17		Sui te 600 Wenatchee, Washi ngton 98807
18		
19	FOR THE RESPONDENT SECRETARY OF STATE	OFFICE OF THE ATTORNEY GENERAL By: Jeffrey T. Even
20	SAM REED:	Assistant Attorney General P.O. Box 4100
21	^ PUT MR. HANDY IN HER	Olympia, Washington 98504 RE **
22		
23		
24		
25		

1	FOCTED DEDDED & CHEFFIMAN DILC
2	By: Thomas A. A. Law
3	FOSTER, PEPPER & SHEFELMAN, PLLC By: Thomas F. Ahearne Attorney At Law 1111 Third Avenue, Suite 3400 Seattle, Washington 98101
4	Seattle, washington 98101
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

3

1 MR. HAMILTON: Your Honor, pursuant to Civil Rule

2  $\,$  41(b)(3), the Washington State Democrats move to dismiss this Page 3

3	el ecti on	contest.
3	el ecti on	contest

Five months ago petitioners filed this election
contest petition with ringing allegations of illegal votes and
election official error. In their petition they admitted that
they could not prove those errors and that those errors in fact
changed the results of the election. And they were right. They
could not and they have not during the course of this trial
proved that the errors and illegal votes changed the outcome of
this election. In Mr. Braden's words just this morning, one can
always speculate. But that's not enough.

over the sweep of the evidence that's been presented over the course of the last five days, the question posed to the Court ultimately reduces to: With this record have the petitioners established by clear and convincing evidence that the election was clearly invalid? If not, the motion to dismiss should be granted because petitioners have now rested and the record, at least as far as their evidence is concerned is complete.

Now, I can understand that the Court may want to reserve ruling, but I do believe that under Rule 41(b)(3), dismissal would be appropriate at this time. In reviewing a case for dismissal under that rule, the Court can either accept the plaintiff's evidence and rule as a matter of law or because

- 1 there's no jury in this courtroom weigh the evidence and enter
- 2 findings of fact, conclusions of law, and judgment of dismissal.
- The purpose of the exercise in a bench trial of course

- 4 is far different than evaluating a motion to dismiss during the
- 5 course of a jury trial where the Court's range of discretion is
- 6 far more limited. Indeed, a Court's decision to dismiss a
- 7 plaintiff's case at this stage in a bench trial is overturned
- 8 only manifest abuse of discretion.

9 The Court is within its discretion to dismiss under

Rule 41 unless doing so is manifestly unreasonable or based upon

11 untenable grounds and reasons. At this point on this record

12 dismissal is appropriate either on the law or upon weighing of

13 petitioner's proof as they have failed to meet their burden of

14 proof. And the case for that reason should be dismissed.

15 Now, I'd like to take a moment to review the

16 petitioner's specific claims. There are some things at the

outset that we can just put aside and the Court doesn't need to

18 address either today or after closing arguments because the Court

19 has already resolved them. I would like to review those quickly.

20 First, you've already determined the standard of proof

applicable in this case. It's clear and convincing proof.

22 Second, the Court held on May 2 and noted again just

23 two days ago that neither party may rely on mere crediting as

24 proof that someone voted or the absence of a credit that someone

25 didn't vote. In the Court's words, any party, whether it's

5

- 1 petitioners or intervenors, who allege that there have been
- 2 illegal votes, they are going to be required to use poll book
- 3 pages signed by the voter or provisional ballot envelopes signed
- 4 by the voter which was submitted presumably at the time or an
- 5 absentee ballot.

6	The Court later noted in the same ruling evidence that
7	a particular person voted should be based on poll books and
8	ballot envelopes. So that settled that credit discrepancies are
9	insufficient to prove that anyone voted improperly.
10	Third, the Court has already resolved what it takes to
11	prove that an illegal felon voted. The Court identified the six
12	elements. I won't recite them again, but the sixth of those
13	elements specifically required proof that each of the alleged
14	illegal voters marked a ballot to indicate a preference in the
15	Governor's race in the November 2004 General Election.
16	The Court went out of its way on May 2 to emphasize
17	that last element. Although the Court would not exclude
18	petitioner's proposed expert testimony on proportional deduction,
19	that even with that testimony in evidence, it just may be simply
20	impossible to come up with all of the elements I've referred to
21	and particularly element six.
22	Fourth, it settled that petitioners must demonstrate
23	more than just errors, more than just frustration with a new
24	computer system, more than just innuendo and suspicion. "Could
25	have" is not sufficient. One can always speculate. But

6

6

1 Washington's election contest statutes clearly require the

2 contestant to show illegal votes or misconduct changed the

3 results of the election. The Court held that on May 2.

Fifth, there's no fraud claim in this lawsuit. As the

5 Court noted on May 2, "In our case here today petitioners have

never alleged fraud." And the Court's observation remains true.

- 7 There is no fraud claim, much less supporting evidence, in this
- 8 case.
- 9 Sixth and finally, although we were not on the record
- 10 a week ago during our telephone conference, the Court has
- 11 excluded any evidence relating to petitioner's belated disclosure
- of several hundred additional names and the document they filed
- 13 at that time entitled petitioner's illegal vote disclosure. So
- 14 I'm going to follow the Court's lead as we discuss why I believe
- the case should be dismissed at this point. I'm going to use the
- nine-point bullet summary that the Court pointed to a few days
- ago from the front pages of the petitioner's trial brief.
- 18 There have been a variety of other allegations that
- 19 have been made during the course of this election contest, most
- of which have been silently dropped by petitioners without
- 21 mention in the trial brief and without evidence to support them
- 22 here during the course of this trial. So I'll focus instead upon
- what the petitioners appear to have actually pursued.
- 24 First, we can put aside several of the claims
- 25 identified in the trial brief that petitioners either have failed

- 1 to support or offered very little evidence to support. Bullet
- 2 point number four from the list, allegations that King and Kitsap
- 3 County counted three ballots cast by persons who voted in another
- 4 state. There's no evidence to support that claim. The Court
- 5 made it clear in its pretrial rulings that petitioners would need
- 6 to demonstrate -- produce actual evidence to challenge the
- 7 residency or establish the residency of those voters, and none
- 8 has been admitted.

9	Second, bullet point number five, this is the evidence
10	Mr. Korrell just introduced this morning, the two voters in Lewis
11	County who were alleged to have cast two ballots each. Again,
12	that's bullet point number five. There is very little evidence
13	in the record to support this claim other than what's just been
14	submitted, which is rather clearly hearsay. Neither of the two
15	individuals have appeared here to be subjected to
16	cross-examination to explain what happened. The illegal vote
17	would be the second vote, the one that these two individuals said
18	they didn't cast the ballot. We don't know who cast those
19	ballots. Those names have never been disclosed.
20	Of course there's no evidence to show whether the
21	ballots contained a vote in the Governor's race or how that vote
22	was cast. And proportional deduction can't be used as a
23	supplement for that evidence because we have no idea where those
24	individuals live. So any kind of statistical deduction of how
25	they might have cast their ballot can't be applied because that

8

4

1 is based solely on geography.

2 In addition, bullet point number three -- I'm sorry,

3 bullet point number two which concerns the allegations of double

voting should be dismissed. In the petitioner's trial brief,

they claim 16 individuals cast more than one ballot in Washington

6 State. There's no evidence to support any of the 16 names

7 disclosed on April 15, 2005. They've been all dropped. Instead,

8 Mr. Korrell stood this morning and added six new names, six new

9 claims of alleged double voting.

MOTI	UN	TΩ	אות כ	MLSS	- V	s txt
IVICALI	UIV	11	כ. ועו	1011 -2-2	- 10	<b>` IXI</b>

10	That evidence is based on hearsay. It's a summary
11	exhibit. Not even the underlying documents have been provided to
12	the Court. And again for the same reasons, the second ballot, we
13	don't know who cast that ballot and whether a vote was cast in
14	the 2004 General Election for the Governor's race or how it might
15	have been cast. All of those claims should be dismissed at the
16	outset.
17	Turning to the third bullet point in petitioner's
18	trial brief that relates to their claim that ballots were cast in

trial brief that relates to their claim that ballots were cast in the name of 47 deceased voters. The only actual evidence in the record is contained in Mr. Korrell's summary chart, exhibit 284.

That exhibit lists 19 names, 11 from King County, 8 from Pierce County, not 47. And that's the only evidence in the record with respect to these claims. The remaining 28 claims must be dismissed because there's simply no evidence anywhere to support them.

9

11

19

20

21

22

23

24

25

1 As to the 19 that actually do appear on the list, they should be dismissed either as an illegal vote claim or as an 2 3 election official error claim. And the first considered as an illegal vote allegation, it's barred by RCW 29A.86.100 which 4 requires a disclosure by whom the votes were given. 5 The test under the statute is not whether the Court 6 7 has made a finding that it's an illegal vote, but whether the 8 allegation is that it's an illegal vote. If the name is not 9 disclosed, no evidence may be introduced and the claim must be Here, quite literally, there's no evidence as to who 10

Page 9

The claim should therefore be dismissed.

cast those 19 ballots.

12 We also don't know whether those ballots contained a 13 vote in the Governor's race. And if they did, for whom they were 14 cast. The petitioners just admit that. There's no other 15 evidence to support the claim and to prove that these ballots 16 changed the results of the election. 17 Circumstantial evidence is not available with respect to these claims, again, because we simply don't know who cast or 18 19 is alleged to have cast the ballots or where those people might 20 So any kind of proportional deduction based on geography is not available. In the absence of direct evidence or 21 circumstantial evidence, the claim should be dismissed. 22 23 The claim also doesn't work as an election official 24 error claim. Again, there's no evidence in the record that any 25 county received actual notice of death of these 19 individuals.

- 1 There's a number of auditors in the room today. Not one of them
- 2 was called to testify by petitioners, and not one of them has
- admitted in deposition that they received notice but somehow had
- 4 neglected or failed to take the names off the rolls. That's not
- 5 clear and convincing evidence. And without that kind of
- 6 evidence, it's impossible to ascribe this as error or neglect of
- 7 duty. And the claim should be dismissed.
- 8 There's only three claims left that I have not yet
- 9 discussed. Allegations about ballot crediting discrepancies,
- 10 that's bullet point seven and nine. Claims based on allegations
- 11 of provisional ballots being fed directly into Accuvote machines
- 12 at polling place tabulation machines, that's claims six and

- eight. And allegations of felons voting without having their rights restored, that's bullet point number one.
- Turning first to the ballot crediting discrepancy
- 16 claim contained in bullet points seven and nine. As the Court
- 17 will recall, petitioners assert that 875 absentee ballots were
- 18 counted in King County in excess of the number of absentee
- 19 ballots it received and verified. That's bullet point seven.
- 20 And that Pierce County counted approximately, and those are the
- 21 petitioner's words, approximately 135 ballots in excess of the
- 22 number of lawfully registered voters who were credited with
- 23 voting. That's bullet point nine.
- 24 The King County claim on ballot crediting discrepancy
- 25 should be dismissed for several reasons. First, and perhaps most

- 1 obviously, the claim that Mr. Bensen explained yesterday is
- 2 premised entirely on crediting discrepancies. The number was
- 3 calculated by comparing the number of voters credited with voting
- 4 by absentee ballot with the number of absentee ballots counted.
- 5 That's insufficient. That calculation falls right into the
- 6 category of issues already decided by the Court.
- 7 Your Honor already made it quite plain that in order
- 8 to prove that someone voted, "they're going to be required to use
- 9 the poll book page signed by the voter or the provisional ballot
- 10 envelope signed by the voter which was submitted presumably at
- 11 the time or an absentee ballot."
- 12 Credit discrepancies are insufficient to prove that
- anyone voted improperly or that an actual ballot was cast by
- 14 anyone other than a registered voter. The inference that

- petitioners are asking you to make through Mr. Bensen's testimony is that a voter credit can be used to prove either that, one, someone voted who shouldn't have; or two, that a ballot was cast without a voter's name attached to it.

  But neither inference is possible precisely for the
  - But neither inference is possible precisely for the reasons that the Court has already identified. And it's too late to reargue this point. So at this point that's easy. The Court's already resolved it. And because the Court has already addressed the foundation and premise for the claim, it should be dismissed.
- 25 Now, I'm sure as the Court may recall from its reading

12

20

21

22

- 1 assignment last night of all those depositions, nothing in these
- 2 depositions even remotely discusses this claim, and that's
- 3 because the claim was never disclosed prior to the filing of the
- 4 trial brief on the Friday before this trial began. And that's
- 5 the reason we filed a motion in limine to exclude evidence
- 6 relating to it.
- 7 Even if the Court's prior ruling did not foreclose
- 8 this claim, the evidence rather dramatically undercuts it.
- 9 First, it's clear and undisputed that no one receives an absentee
- 10 ballot unless they're a registered voter. Mr. Huennekens
- 11 testified to that. So did Nicole Way. There's no evidence to
- 12 the contrary. That's the process.
- 13 Second, we know that all of the absentee ballots that
- 14 were accepted by King County were verified by signature matching
- 15 prior to opening. Nicole Way testified to that fact. Even

- 16 Mr. Foreman emphasized the point in his opening statement
- 17 discussing the mail ballot report. He said, "Number three on the
- mail ballot report is a true number based on the evidence we've
- 19 gotten through discovery. They actually did accept and count
- 20 564, 222. "
- 21 Those ballots were counted three times during the
- original count, machine count, and hand recount, and there's no
- 23 dispute about that. So the only possible concern is that some of
- 24 them -- there may have been an opportunity for some of those
- 25 ballots to be misplaced. But as the testimony demonstrated,

- 1 these ballots were carefully handled with security at every step
- 2 of the process.
- 3 Ballots are locked in a cage inside an alarmed mail
- 4 ballot facility. Political observers from political parties are
- 5 hired specifically to ensure that the processing steps are
- 6 closely observed. Political parties in addition provided
- observers including people like Mr. Brady who testified,
- 8 Mr. Schalestock who wrote that e-mail to Mr. Huennekens about his
- 9 observations, the press, the public, and almost anyone with free
- 10 time was observing the counting process at King County.
- 11 Now, King County did find 95 absentee ballots that had
- 12 been untabulated in the spring of 2005. But no evidence has been
- 13 introduced to explain whether those ballots contained a vote in
- 14 the 2004 gubernatorial election. They obviously can't be counted
- or subjected to the proportional deduction theory because they
- 16 were stored in an insecure location outside the locked mail cage.
- But more importantly, in the wake of their discovery, Page 13

- King County searched through every single box of documents, as

  Mr. Fell's report just admitted into evidence this morning rather

  clearly demonstrates, and found no further evidence of any other

  King County ballots.
- There's no evidence to support this claim. It's based purely on computer reports and voter crediting, an exercise the Court has already rejected as insufficient to prove that a voter in fact voted. That's not clear and convincing evidence, and the

- 1 claim should be dismissed.
- 2 Pierce County, the only other ballot discrepancy claim
- 3 is the one disclosed in bullet point nine relating to Pierce
- 4 County. They argue Pierce County counted approximately 135
- 5 ballots in excess of those credited with voting. Petitioners
- 6 devoted literally no time in this courtroom pursuing that claim.
- 7 The claim on its face is expressly premised on voter crediting.
- 8 That's what the disclosure actually says. Because the Court has
- 9 already held that that's insufficient, the claim necessarily
- 10 fails and should be dismissed.
- 11 There's two other reasons to dismiss this claim as
- 12 well. First, none of the names have ever been disclosed on
- 13 either the final list or the supplemental list, or even today as
- 14 we sit here, pursuant to this Court's scheduled order. Second,
- 15 petitioners have no evidence that in the unlikely event that
- 16 discrepancies actually related to a voter, whether the voter
- 17 marked a ballot in the Governor's race and, if so, for whom,
- 18 petitioners can't identify any of the precincts in which these

# MOTION TO DISMISS - Yes.txt votes were cast and haven't in this courtroom.

- Because they can't, we don't know where they were
  cast. There's no direct evidence of whether or how the ballots
  were voted. And proportional deduction is necessarily
- 23 unavailable given we don't know where they came from. Your
- Honor, that claim should be dismissed.
- 25 At least two, provisional ballots and felons, these

15

19

- 1 are bullet points six and eight in the petitioner's trial brief.
- 2 Number six relates to King County. Petitioners assert that more
- 3 than 1,000 ballots were counted in the Accuvote machines in
- 4 polling location in excess of the number of individuals who
- 5 signed poll books, and that 785 of these may be accounted for by
- 6 individuals who signed the poll book pages for provisional
- 7 ballots.
- 8 The claim, in fact, is much narrower. Petitioner's
- 9 final list of illegal votes did not disclose a list of 1,000
- 10 provisional ballots fed into the Accuvote machine. Instead, they
- 11 focused on a list of 348 premature provisional ballots. That's
- 12 contained in trial exhibit No. 35 that has been admitted into
- 13 evidence. Of these, they only actually identified 317 names that
- they claimed were illegal. All of the allegations in excess of
- 15 the 317 actually disclosed on April 15 were what the Court
- 16 rejected last Friday during the telephone conference.
- 17 Apparently recognizing the import of the Court's
- decision, petitioners have not offered any evidence to support
- 19 any claim beyond the 317 they disclosed on April 15. And there's
- 20 no actual evidence to support the claim.

Page 15

21	Remember what I said during opening statement, there's
22	no evidence that's been submitted here in this courtroom about
23	what happened in those particular polling places. None of the
24	observers, none of the polling judges, none of the polling place
25	workers have testified about what happened. None of the county

paid observers, none of the political party observers, none of the lawyers who flooded into polling places all across our state came into this courtroom even to provide an illustrative example Without that evidence, the petitioners were forced to retreat to second or third or fourth-hand hearsay documents, some of which have been introduced today prepared long after the fact as King County sought to investigate those discrepancies. isn't clear and convincing evidence. In fact, there are a number of alternative explanations for polling place discrepancies as the King County 

explanations for polling place discrepancies as the King County witnesses who actually did the work have explained both on this stand and during their deposition. One of those spreadsheets prepared by the County totaled up 348 instances in which the notes from the polling places indicated that someone thought that a provisional ballot might have gone through an Accuvote machine. But even the petitioners emphasized that this is speculation. The petitioner's trial brief makes that point, and that they really don't know and certainly can't prove that the ballots went through the machines. This is not clear and convincing evidence.

Moreover, some of the work, particularly most recently

one of the documents just introduced as a trial exhibit, deals

- 22 with a second set, 437 provisional ballots alleged by petitioners
- to have gone through the Accuvote machine. But as Michelle
- 24 Kwan's deposition testimony makes clear, that wasn't her task at
- 25 all. And most of that -- those documents rely on far more

- 1 speculative notes gathered by the canvassing crew. In fact, some
- of the work relied on the absence of a tracking label that had
- 3 just been introduced by King County for the purposes of tracking
- 4 provisional ballot envelopes.
- 5 For 3,000 temporary polling place workers, this was
- 6 the first election season in which they were working with that
- 7 new form of provisional ballot. It's hardly surprising that some
- 8 of these labels were misplaced or removed in error. In fact, as
- 9 we know from Mr. Huennekens' testimony, there were 500
- 10 provisional ballots that were put into copies of actual
- 11 provisional ballot envelopes. Those copies obviously did not
- 12 have removable labels. Michelle Kwan testified in her deposition
- 13 that no label meant just that. And so a notation on the sheet
- 14 without a label was counted as a no label.
- 15 The 437 spreadsheet that's been introduced into
- 16 evidence today does not constitute clear and convincing evidence
- 17 that any of these ballots were fed through the Accuvote machine.
- 18 But more importantly, 252 of these came from registered voters.
- 19 Dean Logan in his deposition, Bill Huennekens in his deposition
- 20 both testified to that fact. The majority of these ballots came
- 21 from registered voters and cannot be considered illegal votes.
- 22 Now, Mr. Maguire tried to get the number lower during
- 23 his cross-examination of Mr. Huennekens. Remember how he walked Page 17

24	through t	the sp	readsheet	tryi ng	to show	that	regi s	tered	voter	
25	column di	dn' t	necessari I	y match	exactly	/ with	the	col umn	listir	ng

- the number where they thought provisional ballots might have gone through the Accuvote machine. But the best he could come up with was about 18 votes out of 348 where it didn't match exactly. And
- 4 he only achieved that by ignoring the rest of the polling place
- 5 information that in many cases offset the discrepancies.
- 6 Either way, the petitioners can't deny that the vast
- 7 majority of these provisional ballots came from registered
- 8 voters. But for the error, those ballots would have been
- 9 counted. They can't be considered illegal votes. They were
- 10 plainly from registered voters.
- 11 Dean Logan, Bill Huennekens, Nicole way, and
- 12 Ms. Sanchez all testified that they would have been counted
- anyway had they been turned back by the polling place workers.
- 14 Even the petitioners, if we look at the election contest
- 15 petition, never alleged these were illegal votes, only election
- 16 official error. And the statute clearly allows you to disregard
- 17 those -- or to correct those errors now if there was an election
- 18 official error here, but there's no evidence to suggest that the
- 19 election officials did anything wrong. The Court can recollect
- 20 that you cannot allow registered voters to be disenfranchised and
- 21 be labeled illegal because of an error by an election official.
- 22 Finally, the petitioners have to prove that the
- 23 ballots contained votes in the Governor's race and if so for
- 24 whom. Without that evidence, they can't meet their burden to

19

25

25

1	election. They have no such evidence. None of the voters have
2	testified. None of the ballots have been produced.
3	Remember the testimony. Each of these ballots was
4	creased before being given to the voter. We can find these
5	provisional ballots. We could have found these provisional
6	ballots. But petitioners have no such evidence. And we've heard
7	about provisional about proportional deduction at length
8	yesterday. But that theory won't help us with any of these
9	ballots because we don't know where these provisional ballot
10	voters live.
11	As Mr. Huennekens testified, a provisional ballot can
12	come from a voter registered anywhere in the state. There's no
13	principal basis to discern from geography for these individuals
14	whether they cast a ballot and, if so, for whom the ballot was
15	cast. And you remember Mr. Huennekens explained that in some
16	cases provisional voters were randomly assigned to precincts
17	within a polling place. That's enormously significant because it
18	destroys any nexus between geography and the particular ballot.
19	This is not clear and convincing evidence.
20	All the same arguments apply to the Pierce County
21	allegations, and I won't repeat them. But with respect to the
22	Pierce County allegations, there's an additional argument. None
23	of the names were disclosed ever, even today, pursuant to the
24	Court's order.

Indeed, although the trial brief, the bullet point

claims that there were 164 premature provisional ballots, in

2	their disclosures the petitioners only identified 77 that were
3	illegal. And they didn't tell us which ones. They didn't tell
4	you either. They didn't explain which of the 77 I'm sorry,
5	which of the 164 constitute the 77 they contend were counted as a
6	result of an error or mistake. In the absence of that sort of
7	information though, it's simply impossible to pursue this claim.
8	We don't know how they voted. We don't know if they
9	voted in the Governor's race or where they might live. Pierce
10	County, I'll just add, although our deposition excerpts were
11	inadvertently excluded, they've been provided to the Court now,
12	and when the Court reads Pat McCarthy's entire deposition will
13	know that 138 of the 164 were voted by registered voters. These
14	are not illegal votes.
15	That only leaves the illegal felon vote claim. This
16	is the very first bullet point in their trial brief. And it was,
17	for the most of this contest, the heart of petitioner's claim.
18	Here in this courtroom the claim has faded into obscurity.
19	Petitioners have dropped several hundred names that
20	they originally claimed were illegal felon voters when we pointed
21	out that a citizen doesn't lose his right to vote or her right to
22	vote simply because of a juvenile adjudication. In the trial
23	brief petitioners assert that 883 felons illegally voted in the
24	election. But the evidence doesn't establish that number. The
25	only evidence in the record is in exhibit 284, the summary chart.

1 If we total every single name in exhibit 284 regardless of how 2 weak the evidence is, it's only 754. So there's another 129 3 names quietly dropped from this lawsuit. 4 Another 161 of the names on exhibit 284 are supported 5 by a convicted felony record, sometimes called a CFR. Court will recall, we addressed the sufficiency of that sort of 6 7 evidence in a motion prior to trial. 8 The Court deferred an ultimate decision until trial. 9 And that time obviously has now arrived. We submitted a brief on 10 this issue last night and so I won't belabor the point. A CFR is 11 insufficient as a matter of law to prove a prior conviction. courts require a Judgment and Sentence or an admission, not a 12 13 printout of the document sheet or CFR. A CFR only gives notice 14 of crimes that were charged and a conviction that occurred, not whether the conviction was for a misdemeanor and a felony. 15 As I'm sure the Court is aware, felony charges are 16 17 often plea bargained to misdemeanor convictions. Some defendants 18 are acquitted. This document alone is insufficient. The rule of 19 law in Washington is that even governmental records unlike CFR's 20 that list criminal convictions when used alone are insufficient 21 proof of felony convictions to meet a preponderance of evidence 22 standard. That's the Gill case and the McCorkle case. I've already cited that in the brief we submitted last night. 23 If these kinds of materials are insufficient for the 24 25 purpose of sentencing because of their lack of reliability, it

1 necessarily follows that they're insufficient to disenfranchise a 2 The standard of proof is clear and convincing, and the 3 petitioners haven't met that standard. 4 Finally, and perhaps most obviously, the petitioners 5 have failed to introduce evidence to establish the sixth required element that any of these individuals marked a ballot to indicate 6 a vote in the Governor's race. Obviously they've introduced 7 8 proportional deduction analysis for this purpose. And I know the 9 Court spent most of yesterday listening to evidence relating to 10 that proposed approach to the problem. 11 Mr. Burman has already explained the problems relating to that approach, and I won't repeat them here. I think it's 12 insufficient. There is no direct evidence of how these 13 14 individuals voted. The statistical technique proposed is 15 insufficient to provide indirect evidence to support that. 16 now that the plaintiffs have rested, there is no evidence of what 17 that statistical analysis would show when applied to exhibit 284 18 or the other evidence that's been introduced during the course of 19 this trial. 20 Your Honor, dismissal is appropriate under Rule 41 at Petitioners have failed to introduce anything 21 22 resembling clear and convincing evidence that the November 2004 General Election in Washington State was clearly invalid. 23 24 contest, this trial, this dispute has run its course. 25 respectfully ask the Court at this time to dismiss the case.

1	MOTION TO DISMISS - Yes.txt THE COURT: Thank you, Mr. Hamilton. Mr. Ahearne, did
2	you want to go next?
3	MR. AHEARNE: I talked to Mr. Korrell. I have
4	something short to say on the motion to dismiss. And then with
5	respect to the CFR issue, if it does become an issue, Mr. Even
6	may wish to address it after the petitioner's turn.
7	THE COURT: All right.
8	MR. AHEARNE: Addressing solely the motion to dismiss
9	by the Democrats, the Secretary of State has consistently
10	maintained throughout this litigation that this Court should
11	resolve this case on a full and complete record of the legally
12	relevant facts. That's why the Secretary of State opposed the
13	Republicans' motion for expedited discovery last January so a
14	full and complete record could be developed. That's why we
15	opposed the Republicans' motion in April to bar the Democrats
16	from presenting offsetting errors and offsetting votes so a full
17	and complete record could be presented to this Court. And for
18	that exact same reason, the Secretary of State opposes the
19	Democrats' motion to dismiss.
20	As Your Honor recognized yesterday, the Supreme Court
21	will be reviewing this case. It's in the best interests of our
22	state and the over 2.8 million voters who voted in this election
23	that the Supreme Court's review be based on a full and complete
24	record instead of just one half of the record.
25	Mr. Hamilton quoted Rule 41. And Rule 41 as Your

<sup>1</sup> Honor knows expressly states, "The Court as the trier of fact may

determine the facts and render judgment against the plaintiff or Page 23  $\,$ 

- 3 may decline to render any judgment until the close of all the
- 4 evi dence. "
- 5 The Secretary of State firmly believes this Court
- 6 should decline to enter judgment at this time and render judgment
- at the close of all the evidence so we can put this issue to rest
- 8 one way or the other once and for all. Thank you.
- 9 THE COURT: Mr. Korrell?
- 10 MR. KORRELL: Thank you, Your Honor. I believe Your
- 11 Honor reserved ruling on the -- or at least invited further
- 12 discussion on the standard of proof, and petitioners still
- 13 maintain under the Supreme Court precedence we've discussed in
- 14 earlier briefs that that standard is properly preponderance of
- 15 the evidence.
- 16 Let me begin, Your Honor, by summarizing what we think
- 17 the evidence has shown today. The evidence has come in quickly
- in part because of the extraordinary nature of these proceedings.
- 19 And a good deal of it has come in on paper, and I will try, Your
- 20 Honor, to highlight some of those points as I walk through this
- 21 evi dence.
- 22 The evidence shows, and the evidence is the
- 23 substantive evidence submitted pursuant to Evidence Rule 10.06,
- 24 that felons, dead people, and double voters cast in this election
- 25 at least 789 illegal votes. That number is smaller than the

- 1 number in our trial brief by a few, and the reason for that is
- 2 simple.
- 3 We are moving exceedingly fast, and we have been

- 4 trying very hard to get the documents from counties, particularly
- the signature pages and poll books, to confirm that people voted
- 6 illegally. And consistent with the Court's order where we
- 7 haven't been able to get those in time, we haven't included them
- 8 on our list. But those small reductions do not change the
- 9 overall magnitude of the problem of illegal voting in this
- 10 election. 789 people who should not have voted cast ballots in
- 11 this election.
- 12 Dan Brady testified about his review of the conviction
- 13 records. And Mr. Hamilton suggested we have not made those
- 14 records available to the Court. They are available to the Court.
- 15 They're in the basement. And they can be looked at. But the
- 16 evidence rules contemplate using a summary of those documents
- instead of bringing in those 30 boxes and trying to find room in
- 18 this courtroom for them.
- 19 With respect to the CFR point, I will take the bait, I
- 20 suppose, and diverge for just a moment. That document is a
- 21 convicted felony record. That is a document that is required
- 22 under RCW 10.64.021 to be sent from a superior court to a county
- 23 auditor to notify the auditor that it is time to remove someone
- 24 from a voting roll. RCW 29A.08.520 requires that that person
- 25 then have his or her voter registration cancelled by the auditor.

- 1 We submit, Your Honor, if it's good enough for those
- 2 purposes, it is good enough for these. There are only a handful
- 3 of people on that list. And if Your Honor looks through the
- 4 documents submitted by Mr. Brady or submitted through Mr. Brady,
- 5 you will see that there are a handful, I can't remember whether Page 25

6 it's six or seven, for whom there are just CFR documents. 7 vast majority of the felons who voted who have CFR documents in 8 the files also have in their files other documents, certified 9 copies of docket sheets, and more of them notices from Dean Logan 10 that their voter registration rights have been cancelled. if it is good enough for those purposes, Your Honor, I submit it 11 12 is good enough here. 13 Voting without one's rights restored is a crime. 14 Voting on behalf of a dead person is a crime. And that is voter We've had a semantic debate about whether fraud is in 15 16 this case, Your Honor. But if someone submits a ballot on behalf 17 of a person whom he is not, he is doing something intentionally to manipulate the outcome of the election. And whether we put 18 that word on it, we know what it is. 19 20 So is voting twice. So is intercepting a ballot from 21 someone and voting it for them. We've had evidence about the 22 Monaghans' ballots. We had evidence about the ballot from the 23 deceased Ms. Witte. In addition to the 789, we disclosed and the 24 evidence shows 1,156 more ballots counted by Accuvote machines in

27

25

1 pursuant to King County's records.

2 You heard the testimony of Bill Huennekens. You have

King County than ballots issued to regular poll voters. That's

3 the deposition of Linda Sanchez and the polling place

4 reconciliation summary, which is trial exhibit 36. And if Your

5 Honor does what Bill Huennekens described on the stand and add up

6 the positive discrepancies in those precincts, what you determine

- 7 is King County counted 1,156 more votes through those Accuvote
- 8 machines than they can find people who received the ballots
- 9 properly. That's ten times the margin of victory in this case.
- 10 After seven months of effort, King County still cannot
- 11 reconcile these numbers. Their best estimate is that 785 of them
- were cast as provisional ballots directly into the Accuvote
- machine before anyone could verify whether these people were
- 14 lawfully registered voters and whether they had already voted by
- some other means. That is King County's best estimate.
- 16 You will find testimony about that from Ms. Kwan,
- 17 Ms. Sanchez, and Mr. Huennekens. Mr. Huennekens live of course
- and in his deposition. As well as in the provisional ballot
- 19 reconciliation spreadsheets, trial exhibits 35 and 37. As a
- 20 matter of law those are illegal votes.
- 21 The Foulkes v. Hayes case says that an illegal vote is
- 22 a vote cast in a manner other than is provided by law. The law
- 23 requires you show up at a polling place and your name is not on
- the list, when you vote, you have to vote by provisional ballot.
- 25 To do that, you've got to fill out the form on the envelope and

- 1 provide the information so that the County can verify whether or
- 2 not your vote should be tabulated.
- 3 King County's estimate is that about 785 of those
- 4 didn't do it that way. Instead they passed it directly through
- 5 the Accuvote machine, thereby bypassing the procedural safeguards
- 6 assigned to prevent illegal voting.
- 7 In addition to the 785, Your Honor, there are 155
- 8 other errors that King County has testified to. That's the Page 27

9 fourth item down on our chart. Any number of errors King County 10 has speculated may have caused those ballots to be counted. 11 Absentee ballots stuck into an Accuvote machine, for example. 12 That's an illegal vote. A voter gets a ballot without signing 13 the oath of voter confirming that he is who he purports to be, or 14 perhaps an Accuvote machine gets stuck and counts a ballot twice. 15 I don't think that makes the voters of the State of 16 Washington sleep any better, Your Honor. And King County itself 17 maintains that for the last number, the last component of that 18 1,156, they simply have no idea. It has thrown up its hands. It 19 has no idea where those mystery votes came from. 20 This is an election decided by 129 votes. If it were an election in which 22,000 people cast ballots, it would have 21 22 been decided by one single ballot. The margin is razor thin. 23 And when King County itself says these are completely 24 unexplained, one can have absolutely no confidence that we have

29

25

reached the right result.

1 In addition, 875 more votes were counted by King 2 County than were credited with voting. This is derived at simply 3 by looking at the manual recount returns. That is the total 4 number of votes tabulated. And King County's locked down voter 5 crediting files. After accounting for the discrepancies that 6 might be caused by federal write-in ballots or the people in the 7 address confidentiality program, the number is 875. In a system that automatically credits voters when their absentee ballot 8 9 envelopes are processed, this is a huge discrepancy.

#### MOTION TO DISMISS - Yes.txt 10 Now, Mr. Hamilton said crediting is not an issue in I understand why he doesn't want it to be an issue in 11 this case. I would ask the Court to recall the circumstances in 12 this case. 13 which this crediting issue came up. The intervenors were concerned because the number of felons who were credited with 14 15 voting was staggeringly high. And there are problems with some 16 of the poll place crediting processing. 17 They describe in their motion and their brief to 18 exclude that evidence as evidence of a felon vote, that sometimes 19 the bar code gets scanned incorrectly, or someone has signed in 20 the wrong place on the poll book, and that those errors made the crediting data unreliable as proof of a felon's actual vote. 21 22 And the Court agreed. Those criticisms don't apply to 23 the crediting of absentee voters. These ballots as described by Nicole Way and by Bill Huennekens and others are processed 24 25 automatically. And when that ballot is processed for

30

1

10

by Washington law.

2 provisional ballot envelope. Even if it's empty. 3 Secretary of State Sam Reed testified, for absentee ballots the tracking of is such that when a ballot is sent in, 4 that is credited and takes place before certification. It is not 5 in, the case of the poll ballot, a post-certification creation of 6 7 historical record. According to Sam Reed, it is an important 8 mechanism to prevent multiple voting. It is an essential element 9 of maintaining the absentee ballot audit trail that is required

verification, the voter is credited with having cast that

And a final point about absentee crediting. Mr. Fell Page 29

12	testified in his deposition that even if there are errors in
13	crediting, those errors should be random. But if you look at
14	where the largest discrepancies are, that is, you look in the
15	precincts where there is the largest number of extra ballots,
16	overvoters credited, and you look at the precincts in which there
17	is the largest number of voters above excuse me largest
18	number of people credited, above votes actually counted, you see
19	a disturbing pattern.
20	The precincts that were put up on the overhead and
21	that Mr. Bensen testified to, the four precincts with the largest
22	number of extra votes over credits are strong precincts for
23	Christine Gregoire. And the four with the largest number of
24	missing votes versus credits were all but one precincts where

Dino Rossi polled very strongly. Whatever the merits of the

31

25

1 intervenor's concerns regarding the use of poll site crediting to 2 determine whether a particular felon voted, the Court simply 3 cannot ignore these discrepancies or their distribution. In addition, Your Honor, to the votes that we have 4 5 totaled up here which, if you haven't done the math, is 2,820 problematic ballots, counties have also lost and apparently found 6 When we started this trial I thought it was 95 ballots 7 found in King County, and Mr. Huennekens told us it's 96 ballots 8 9 that have been found in King County. 10 Ms. Way testified that she can't be sure there won't be more. Pierce County found 64 ballots that had never been 11 12 That's in the McCarthy deposition that we submitted to counted.

- 13 Your Honor. That adds up to 160 ballots found after the election
- 14 and never counted. That alone obviously exceeds the margin of
- 15 victory.
- 16 For Pierce County we've been unable to get the
- 17 precinct data for all of those. But for King County we do have
- 18 the precinct data. It's in the Fell report that we discussed
- 19 this morning and is a part of the depositions, the Logan and Fell
- 20 depositions, and I think it's trial exhibit 6. And that lists
- 21 the precincts in which these ballots were found long after the
- 22 election.
- 23 And when you look at the vote totals for those
- 24 precincts as Mr. Bensen did, you see that more of them came from
- 25 precincts that favored Mr. Rossi. The testimony of Nicole Way

- 1 was significant, and it explains why these staggering
- 2 discrepancies are a problem. I'd ask Your Honor to recall Nicole
- 3 Way's e-mail that was sent in October, not after finding of the
- 4 ballots, but in October before the elections.
- 5 This is trial exhibit 18. She warned her supervisors
- 6 that their system would not allow them to track the number of
- 7 ballots sent or received. Again this is something Secretary Reed
- 8 said is fundamental to maintaining the audit trail.
- 9 She also testified that she had been raising this
- 10 concern since June. According to Secretary Reed, you cannot have
- 11 a true audit trail. You cannot be sure there has been no
- 12 multiple voting. You cannot be sure that ballots are not being
- 13 counted unless, sent by lawful voters, unless you have a good
- 14 absentee ballot audit trail.

15	I'd ask Your Honor to pay particular attention to the
16	Dean Logan deposition where he in essence says that we rely on an
17	honor system to keep track of many of the ballots. In the course
18	of Nicole Way's deposition, we walked through a spreadsheet. And
19	that spreadsheet had three main columns.
20	The first column was for the validation process for
21	these ballots, for absentee ballots. That's the process in which
22	the signatures are verified. At the end of that process a
23	certain number of those ballots are then passed on to
24	tabulation excuse me passed on to opening. They're first
25	verified; then they're passed on to opening. After the opening

- process, they then are passed on to the tabulation process. And at every step along that process, there are discrepancies.
- She testified that they should be investigated, but that they often are not. She testified there is no systematic
- 5 investigation of discrepancies. She testified that if you add up
- 6 the discrepancies, you will get to a total number of them at the
- 7 bottom. And there are many hundreds of discrepancies.
- 8 When you have an election decided by 129 votes, and
- 9 you have 875 more ballots counted than King County can identify
- 10 voters who cast them, it is reasonable to be exceedingly
- 11 suspi ci ous.
- 12 I mentioned just a second ago the Dean Logan
- deposition, and I would ask Your Honor to think about that. Dean
- 14 Logan testified that when they received ballots from the printer
- they come in packets. But they don't do anything really to

- 16 confirm how many ballots are in the packet. They trust the
- 17 purchase order. Partisan inspectors are the people who are
- 18 entrusted with those ballots over the weekend. And at the end of
- 19 the election night, if there's a packet that's not completely
- 20 full, not been completely used, there's no auditing of those
- 21 extra ballots. They're just to be destroyed.
- 22 When it came time to report the mail ballot report to
- 23 the canvassing board, Nicole Way and her supervisor Garth Fell
- 24 prepared a report that they both knew was inaccurate. It was
- 25 inaccurate because it identified on the report the total number

- 1 of absentee ballots received. And it didn't. All it included
- 2 was the number of absentee ballots counted added to the number of
- 3 absentee ballots rejected, which hid the fact that the numbers
- 4 didn't match. They hid it from the public and from the
- 5 canvassing board who needs to have accurate information to be
- 6 able to certify the results.
- 7 So what is the evidence that led to counting ballots
- 8 that didn't come from lawful voters? Again, there's a
- 9 discrepancy of 875 more votes counted than this much later that
- 10 King County can find voters would cast them. In addition, the
- 11 bottom of that spreadsheet we walked through with Nicole Way, you
- 12 add up those columns, of the check column on that spreadsheet,
- there are hundreds of individual discrepancies that cannot be
- 14 explained by the spreadsheet, that cannot be explained by batch
- 15 slips, that cannot be explained by Ms. Way, and that cannot be
- 16 explained by King County because no systematic investigation was
- 17 conducted.

18	Your Honor, I don't think that anyone in Chelan County
19	or King County or Olympia, or anywhere else in this state
20	believes that we can really know who got the most number of legal
21	votes in this election. I mentioned the razor thin margin. This
22	was the closest gubernatorial race in our nation's history. And
23	King County, our state's most populace and probably wealthiest
24	county, has what the Secretary of State has called the most
25	backward election system in the state.

35

As the Democrats have pointed out and will likely 1 2 point out over next week, other counties made mistakes, too. 3 With 160 new found ballots, over 2,800 invalid votes counted due 4 to error and neglect of elections officials in addition to many 5 of them being illegal votes, we cannot possibly know that 6 Christine Gregoire got the most number of legal votes in this 7 el ecti on. 8 Which brings me to a discussion of the law. I want to 9 discuss briefly, Your Honor, the Foulkes v. Hayes case and Section 011 of the election contest statute. This has been for 10 11 all of us a difficult case, a great deal of hard work for the 12 lawyers, and I know for the Court and the staff. We have 13 submitted a staggering amount of briefing, and the Court has done a remarkable job of turning around decisions under immense 14 15 pressure. 16 There is one area I fear, however, Your Honor, that we may disagree, and I'd like to address that briefly at the close 17 18 of our case.

19	MOTION TO DISMISS - Yes.txt In Your Honor's oral opinion on May 2, you commented
20	that one of petitioner's theories may be tempting or persuasive.
21	That's the theory of the Foulkes v. Hayes theory. When you have
22	a large number of problematic ballots, illegal votes, and
23	election errors that exceeds the margin of victory, the Court
24	must set the election aside.
25	The Court's oral opinion indicated that the Court

36

14

15 16

17

18

19

20

1 felt, one, precluded from adopting that by the contest statute. 2 And second, it may not apply in these circumstances because it 3 didn't address the specific contest provisions at issue. I'd like to address that just briefly and assure the 4 5 Court that the Foulkes case did squarely address both analogous facts and the very same contest statute provisions that we are 6 7 They have different RCW numbers. litigating here today. 8 were codified in a different place. But the language remains 9 exactly the same for present purposes, that is, for issues that 10 we are litigating here. 11 The Foulkes case held that where neglect of election 12 official as such that you cannot tell who got the most legal 13 votes, the Court must set the election aside. In that case the

ballots, could not identify the names of the voters whose ballots had been manipulated because they were secret ballots.

Nonetheless, the Court found that based on the evidence of neglect and error that allowed the likely manipulation of ballots, the Court had to set aside the election.

Page 35

couldn't identify the persons involved in manipulating the

neglect was leaving a key in some padlocks. And the challenger

21	Here we also have neglect and error by elections
22	officials, apart from the felons and the dead people and the
23	double voters which are addressed in a different part of the
24	statute. As I mentioned earlier, 785 provisional ballots were
25	pushed through the Accuvote machine without being verified. They

- were pushed through by someone. We don't know for certain who they were.
- 3 Of the remainder of the 1,156 discrepancies based on
- 4 the poll books and King County's investigation, King County has
- 5 thrown up its hand and said it has no clue where those 215 votes
- 6 came from. And as I mentioned earlier, 875 more ballots than
- 7 voters credited and 160 uncounted valid absentee ballots never
- 8 counted because they were lost.
- 9 With all due respect to Your Honor and this Court, the
- 10 Foulkes case and its construction of the same specific statutes
- 11 that we're talking about here compels rather than precludes your
- 12 setting aside this election. It is for the Supreme Court to
- 13 decide that Foulkes and its interpretation of the contest statute
- should be changed.
- 15 I also want to address the standards under 070 and 110
- 16 of the contest statute and the issue of proportional deduction.
- 17 Two experts testified, Your Honor. One is one of the most
- 18 prominent political scientists on elections issues in the
- 19 country, another a distinguished professor at the University of
- 20 Washington. Both independently looked at the universe of illegal
- 21 votes that they were given. And as Your Honor undoubtedly knows,

- we are required to list the universe of felons and dead people
- 23 that we were going to litigate.
- 24 So they had to look only at that universe. And they
- 25 both concluded nearly identically that if you use a proportional

- 1 deduction method -- that you should use a proportional deduction
- 2 method to provide the best available guidance on how illegal
- 3 votes were cast. The system that they propose to use is
- 4 virtually identical to the system used by the U.S. Congress in
- 5 election contests. It's used in election contests around the
- 6 country.
- 7 And in opposition to the Frye briefing, we submitted
- 8 to Your Honor an appendix of an extensive list of cases in which
- 9 a similar analysis was used. The experts offered by the
- 10 Democrats really offer the Court no assistance in what to do with
- 11 this set of illegal votes that we have. They simply say you
- 12 can't answer the question.
- The experts that we've identified, Your Honor,
- 14 Drs. Katz and Gill, both testified that if you deduct the illegal
- 15 votes that we have established in this case in the proportions
- that they described, Dino Rossi was the winner of the election.
- 17 With respect to the argument Mr. Hamilton made that
- 18 you must have a name of a person casting an invalid ballot to be
- 19 able to challenge it under the statute, I think that is one of
- 20 the more tortured readings of this statute. By its term Section
- 21 100 does require that three days before trial the petitioner
- 22 provide the Court and the parties with a list of the illegal
- votes it intends to litigate. But illegal votes are defined in Page 37

the statute only under Section 020 sub 5. That's the illegal vote section.

Nothing in the contest statute says anything about providing a list of names for ballots that were counted improperly due to election official misconduct under 020 sub 1 or errors in neglect of election officials under 011.

Under the reading proposed by the Democrats, if

Under the reading proposed by the Democrats, if someone stole ballots but you can't figure out who that person is, you know they stole them, you know the ballots are missing but you can't find that person and give him his name, you can't have a contest. You have to pretend it didn't happen. If you don't know the names of the voters whose ballots were stolen, you can't have a contest. You have to pretend it didn't happen.

Their reading is inconsistent with the Foulkes case where you clearly didn't know the names of the voters whose ballots had been manipulated. They didn't know the name of the person who did the manipulating, but you can still have a contest. If someone sneaked ballots into the stream of ballots, and not hard to do given the King County accounting procedures, and the result was inflated numbers, if you can't identify that person, under their theory you can't have an election contest. You just have to pretend it didn't happen. If there were a serious mistake in handling ballots but you don't know the name of the person who was responsible, under their theory you can't have a contest. You have to pretend it didn't happen. We submit, Your Honor, that that is a reading that is completely

1	And in closing, Your Honor, if the Court dismisses
2	this case, a case with the thinnest of margins, a case where
3	there are far more found ballots than the margin, a case where
4	there is overwhelming evidence of error and neglect, and as I
5	said, I suspect next week the Democrats will offer even more
6	evidence of error and neglect in this case, in a case in which
7	after seven months it is still impossible to figure out who cast
8	875 ballots in King County, in which many hundreds of felons,
9	dead and double voters voted, in a case in which it appears by
10	King County's best estimate 785 provisional ballots put through
11	the Accuvote machine illegally, in a case with these huge
12	discrepancies and a disturbing pattern in some of them, if the
13	Court dismisses this case at this stage, then Washington has no
14	meaningful election contest statute. That cannot be what the
15	Legislature intended. And we respectfully request that Your
16	Honor deny the motion to dismiss.
17	THE COURT: Thank you, Mr. Korrell. Mr. Hamilton?
18	MR. EVEN: Your Honor, I do have as Mr. Ahearne
19	indicated a few comments on the CFR issue. It's up to the Court
20	of course in what order you want to hear from us.
21	THE COURT: If I could leave you to last.
22	MR. EVEN: That will be fine.
23	MR. HAMILTON: Your Honor, we started this motion with
24	a motion to dismiss, and we ended it with a motion for
25	reconsideration of the Court's rulings over the course of this

1	election contest proceeding.
2	I'd like to start with Hill v. Howell, a case on which
3	the Court of which the Court is quite familiar. Hill v.
4	Howell talks specifically and addressed the points that
5	Mr. Korrell has already addressed. As the Court held there, "If
6	it was an illegal vote, it was proper to show for whom the
7	electoral voted. And since the fact is not shown, it must be
8	treated between the parties as a legitimate vote. Neither of the
9	candidates were responsible for the manner in which the vote got
10	into the ballot box, and both being innocent of wrongdoing, it
11	would be an injustice to charge the error to either of them."
12	That's the law of the State of Washington. And
13	Foulkes didn't change it. This case is not the Foulkes case.
14	The Court has already heard extensive briefing and extensive
15	argument on the matter. Foulkes didn't interpret the election
16	contest statute. 011 wasn't made part of the election contest
17	until 1977. In Foulkes there were altered ballots. There's no
18	evidence of anything like that. Oll was made subject to the
19	election contest statute two years after Foulkes was decided.
20	The election contest statute controls this matter. Foulkes has
21	no application here. The Court has already ruled, and I don't
22	think it's time to revisit the ruling now at the conclusion of
23	the plaintiff's case.
24	I'd like to take just a moment to address some of the
25	other arguments Mr. Korrell advanced. First, looking at his

1 summary exhibit he just displayed, he alleges that there were 2 1,156 premature provisional ballots cast through the Accuvote machine. And he reached that number by looking at the large 3 4 spreadsheet that King County prepared, by summing all of the 5 positive variations but by ignoring every one of the negative 6 vari ati ons. 7 Mr. Huennekens said you can't do that. There isn't an 8 auditor sitting in this room, there isn't an auditor in 9 Washington who would suggest that ignoring the negative 10 variations and counting only the positive variations is an 11 appropriate way to try and reconcile ballots. Mr. Korrell suggests that there were 785 provisional 12 ballots put through the Accuvote machines, and that King County 13 14 has conceded that fact. That is a stretch that is not remotely supported by the evidence. 785, I'm sure the Court knows by now, 15 is the sum of the 348 spreadsheet plus the 437 spreadsheet. 16 17 of those are secondhand. The 437 is based, as Michelle Kwan testified in her deposition, on an analysis of no label. 18 19 wasn't even trying to determine whether premature provisional 20 ballots had been fed through the Accuvote machine. The 348 is 21 pursued with seriousness by Mr. Korrell only with respect to 317 22 of the names that were disclosed on April 15. And the vast bulk 23 of those were cast by registered, lawful voters. 24 Mr. Korrell put the number 216 on the board as 25 completely unexplained. At best that's a subset of 1,156. That

1 wasn't completely unexplained. Mr. Korrell wasn't at those 2 depositions to hear the testimony. But the testimony is before 3 the Court in the transcript explaining the 216 number as a 4 function of the valid accountability spreadsheet prepared by 5 Ms. Sanchez. Finally, Mr. Korrell put the number 875 onto the 6 7 This is the credit discrepancies for absentee ballots. 8 Now, Mr. Korrell suggests that we should all sleep better because 9 the absentee ballot crediting is a machine process controlled by 10 a computer system. And if one thing is clear from this 11 discussion and the testimony in this courtroom, and that is that 12 the computer system at King County records and elections during 13 the November 2004 General Election had some problems. 14 It had some problems because King County implemented a 15 new computer system during the summer of 2005, and they were 16 struggling to work with it. That's the explanation for Nicole 17 Way's e-mail in which she expresses her concern and frustration 18 about the inability to generate the same reports she used to get. 19 There's utterly no testimony that any absentee ballots were taken 20 or any absentee ballots were added. Mr. Korrell's suggestion and implication and inference 21 22 and suspicion as he stands here at this podium is not evidence. 23 And there is no evidence of any ballot tampering. Washington law 24 presumes regularity, presumes that election officials do what is

25

required of them. And they did.

1	MOTION TO DISMISS - Yes.txt Mr. Korrell just addressed the CFR issue and suggested
2	that it's a document submitted to the auditor to notify the
3	voters of registration revocations. And that may be. But a CFR
4	is insufficient as a matter of law to establish a prior
5	conviction for sentencing purposes which you need to only prove
6	by a preponderance of evidence. That's Washington law. The
7	matter before the Court is far graver than simply enhancing a
8	sentence in a criminal proceeding.
9	Mr. Korrell would have the Court rely on that
10	document, which is insufficient to meet a preponderance standard,
11	to overturn a statewide election for the Governor of our state.
12	I submit that if it's insufficient to provide a standard for
13	sentencing purposes, it is certainly insufficient for our
14	purposes that bring us here today.
15	Mr. Korrell said some of these ballots were stuck and
16	counted twice and says we're supposed to sleep better with that
17	explanation. Your Honor, we're supposed to sleep better because
18	Washington provides a method for dealing with close elections.
19	There was a count. And because it was close, there was a
20	recount. And because it was close, there was a hand count.
21	There's no ballot that got stuck and counted twice. The results
22	that bring us here were the results of a hand count. Hand

23

24

25

counting every ballot.

And that ultimately is the process by which Washington

We count

State resolves close elections. We count the ballots.

<sup>1</sup> them again if they're within a certain margin. And ultimately we

do a hand recount. Guessing and suspicion, social science that Page 43  $\,$ 

3	has never been applied or recognized in Washington State is not a
4	sufficient ground to overturn the results of the election.
5	With respect to the 875 absentee ballot credit
6	discrepancy alleged by Mr. Korrell, the testimony is clear.
7	Every single one of those absentee ballots was verified prior to
8	counting. If this is anything other than a software error or an
9	accounting discrepancy, then every one of those ballots was
10	verified, matched, came from a registered voter prior to
11	counting.
12	Mr. Korrell briefly discussed the illustrative exhibit
13	used by Mr. Bensen discussing a group of ten precincts and the
14	results and suggests that these are nonrandom results. There's
15	no evidence in the testimony there's no evidence before the
16	Court to suggest whether that's a random result or not a random
17	result. Mr. Korrell isn't qualified to offer that opinion.
18	Mr. Bensen is not an expert. And even he didn't offer that
19	testi mony.
20	Mr. Korrell discussed briefly the testimony of Nicole
21	Way. Nicole Way did not prepare a report she knew that was false
22	at the time it was prepared. And that was utterly clear at the
23	time of the testimony of this courtroom. You'll recall just

46

24

25

1 questions, the Court made plain what the petitioners had not.

questions. And at the end of the day with three simple

2 Nicole Way and Garth Fell and their superiors at King

about every lawyer within a 10-block radius took turns asking her

3 County were struggling with a newly implemented computer system

- 4 and provided the most accurate report that they could with the
- 5 information that they had. It's not a report she knew was false.
- 6 That was a report she knew was as accurate as she could possibly
- 7 make it.
- 8 At the end of the day, Your Honor, we have a process
- 9 for resolving close elections. It's not guessing. It's not coin
- 10 flipping. It's not social science with proportional deduction.
- 11 Those are all choices that the Washington Supreme Court could
- 12 have made or our Legislature could have adopted but didn't. The
- 13 election contest statute controls this proceeding and dictates
- 14 the result.
- We move for summary judgment -- we move for dismissal
- of the plaintiff's case at this point because the evidence is
- 17 clear that the case should be dismissed. There's a burden of
- 18 proof, and it's a heavy one, that an election contest petitioner
- 19 must meet. It's no small task to overturn the results of a
- 20 statewide election in which 2.8 million voters participated.
- 21 Mr. Korrell suggests that because he can't find the
- 22 evidence we should guess what it might show. But that's not the
- 23 standard. Mr. Korrell has the burden of proof, and it's heavy,
- 24 and he has to prove by clear and convincing evidence that but for
- 25 the errors, the result would have been different; that but for

- 1 the illegal votes the election result would have changed.
- 2 And if he can't, then Hill v. Howell tells us what the
- 3 result is. The error cannot be charged to either candidate
- 4 absent proof of their involvement. He cannot, and he has not.
- 5 The time has come to pare down this case. The entire case should Page 45

6	be dismissed. The petitioners have failed to meet their burden.
7	And Mr. Korrell's silence with respect to a number of the
8	specific claims is telling. Thank you, Your Honor.
9	THE COURT: Thank you.
10	THE COURT: Mr. Even.
11	MR. EVEN: Thank you, Your Honor. The intervenors
12	have filed a motion in this case to exclude evidence of what
13	we've called convicted felon records or CFR's for short. And I
14	have to admit this is a motion that I have struggled with to some
15	degree. It may be that given the hour my hunger is causing me to
16	struggle even more, but let me offer a few observations.
17	The intervenors initially filed this motion last week
18	and we considered it during the telephone conference that's been
19	referenced this morning. At that point the Secretary of State
20	took the position that it was premature for the Court to resolve
21	this issue because the Court had not been provided with

25 But we didn't have the kind of information that would

couple of examples attached to a declaration that was filed in

information as to what these records actually are. There were a

48

22

2324

support of the motion.

ordinarily be laid if a party were laying a foundation to

- introduce the document into evidence. We simply didn't have
- 3 that. We had a couple examples themselves, and there was a
- 4 declaration that discussed one of them and indicated it had been
- issued in error by a particular clerk's office involved.
- 6 The reason that I say I struggled with this is that I

- 7 didn't know exactly what these are. The only information that
- 8 we've received as to what they are is Mr. Korrell's
- 9 representation this morning that these are the records the county
- 10 clerks issue and send to auditors. And then we have a statute
- 11 29A. 08. 520 that directs the auditors to cancel a voter's voter
- 12 registration based on that document if they find a match in their
- 13 voter registration record. So that's the mechanism for the court
- 14 clerk to convey to the election official that a person who may or
- may not be a registered voter has been convicted of a felony.
- Now, we have not still at this point received anything
- 17 other than Mr. Korrell's representation as to what they are. I
- 18 will acknowledge his representation is what I privately
- 19 suspected. But we don't have anything further.
- The Court has admitted into evidence a number of
- 21 spreadsheets dealing with illegal votes that are essentially
- 22 compilations or summaries of the documents that have been
- 23 referred to in the basement. And some of those indicate the
- 24 presence of one of these CFR documents. But unless I've missed
- 25 it, and if I have, I apologize. The only other information we

- 1 perceived on this was Mr. Korrell's representation this morning.
- 2 And I think with that observation I've said about all I can say.
- THE COURT: All right. Counsel, even though it's now
- 4 1:00, I'm going to give my decision with respect to what I
- 5 perceive are two motions, and I'm going to be pretty brief doing
- 6 this.
- 7 I'm going to start with the intervenor's motion
- 8 involving what are called CFR's, which is as counsel have noted a Page 47

9	motion that was before the Court Last Friday, one of just a slew
10	of motions the Court dealt with within a week's period of time.
11	The Court actually entered a written order based on
12	the Court's then analysis, and the Court determined that the
13	motion would be denied, that is the intervenor's motion,
14	concerning the so-called convicted felony records. But the Court
15	did not foreclose the possibility in essence that the Court would
16	revisit the issue at trial. And we're at that point in this case
17	where intervenors ask the Court to do that.
18	The Court is at some disadvantage because the Court
19	has not seen what I think Mr. Korrell represents may be
20	approximately six or seven CFR's that are downstairs in the
21	boxes. What I did see was what I saw last Friday when the Court
22	reviewed the declaration of Mr. William Rava, R A V A, which is a
23	declaration in support of the Democratic Central Committee's

motion regarding the so-called CFR's, and attached to that

declaration was a CFR for a particular individual whose initials

were DCC, which purportedly indicates that this particular person was convicted in King County.

Now, I'm going to go through some of the same things I went through in the Court's written decision in this regard. And I do this not to make this particularly tedious, but because I need to address some of the arguments that Mr. Hamilton did not make orally today but which have been made in the written materials that are in the second motion. Because overall the argument is that this is not the so-called best evidence of a

10	MOTION TO DISMISS - Yes.txt criminal conviction. And that term may be used a little loosely,
11	but that's the term.
12	What I have in front of me as a part of Mr. Rava's
13	declaration was a CFR which shows this: The person's name, the
14	person's date of birth, the person's gender, the person's race,
15	the person's address. And I'll switch now and use the
16	defendant's information as to the original charge. In this case
17	the charge was by information.
18	The CFR shows the statutory reference for the charge.
19	In this case it happened to be assault first degree. It shows
20	the date that the information was filed. It shows what is called
21	in this the severity category as being, of course, for assault
22	first degree a felony. And then there were some other charges
23	that were also filed as a part of this information, as of course

is so often done and as one might imagine here, assault first

51

24

25

degree.

1 Along with that was the interfering with the reporting of a domestic violence incident. 2 There was another assault 3 fourth degree and the interfering with the report of that. That 4 being a so-called domestic violence-related crime. There are statutory references for those crimes. The severity category is 5 indicated, as is again the alleged violation dates. 6 7 As we all know so often happens, and I certainly do 8 not mean to disparage prosecutors, but the charge goes from 9 assault first degree through various permutations until on in this case April 6, 2000, there was a plea bargain entered into, 10 and the assault first degree was reduced to an assault third 11 Page 49

12 That assault third degree, the statutory reference was 13 indicated to support the charge. The severity category was 14 indicated. And the same thing applies to the other counts of 15 this information. 16 The CFR indicates not only how the case was resolved 17 but the date that it was resolved. It was resolved, according to 18 the CFR, by entry of a guilty plea. And the case was completed about a month later by the entry of a Judgment and Sentence. The 19 20 Court would read this to be the sentencing date. 21 So in looking at this particular CFR, the Court 22 believes that it has all of the information that it would need to 23 determine the crime and whether or not it was a felony. I don't know if the CFR's that Mr. Korrell has downstairs in the boxes 24

convey this same information, counsel. You probably have seen

52

25

1 those and I haven't. But if they do, then I think they're 2 sufficient. If they don't, and I'm talking particularly the severity category where the Court is just left to guess or to 3 4 pull an RCW, I'm not going to do that because I'm not 5 investigating this case. You understand, Mr. Korrell? MR. KORRELL: I understand. 6 7 THE COURT: To the extent that the CFR's downstairs 8 that are being given to the Court in support of a person being a 9 felon and therefore voting illegally -- again, if it meets 10 everything that I see on the CFR that's attached as exhibit B to Mr. Rava's declaration, then I think it's sufficient. If it's 11 12 not, it's not. That's how I'm going to have to rule on this

- 13 i ssue.
- 14 Now, the second matter before the Court is serious.
- 15 And I know counsel are taking this serious. The motion that
- 16 Mr. Hamilton makes on behalf of his client is a motion to dismiss
- 17 this case right now after five days of testimony and argument.
- 18 And the motion is based on Civil Rule 41, Subsection 3. That
- 19 particular subsection reads in part as follows: "After the
- 20 plaintiff, the petitioner in this case, in an action tried by the
- 21 Court without a jury has completed the presentation of his
- 22 evidence, the defendant, the intervenors here, without waiving
- 23 his right to offer evidence in the event the motion is not
- 24 granted, may move for a dismissal on the ground that upon the
- 25 facts and the law the plaintiff has shown no right to relief.

- 1 The Court as trier of the facts may then determine them and
- 2 render judgment against the plaintiff or may decline to render
- any judgment until the close of all of the evidence."
- 4 That's I think the legal basis for the intervenor's
- 5 claim here, and of course in addition to the arguments that have
- 6 been made this morning and now this afternoon. And the Court
- 7 understands that under CR 41.3, the Court also is required if the
- 8 motion is granted to enter findings and conclusions pursuant to
- 9 Civil Rule 51.
- 10 This case most pointedly involves Mr. Rossi and
- 11 Ms. Gregoire's desire to be the Governor of the State of
- 12 Washington. Very important to each of those individuals. And
- 13 almost if not as important is the desire of their respective
- constituents to have them be the Governor of the State of Page 51

. •	
16	This case, however, also has another element that is,
17	I think, as important. And that is what the citizens or
18	residents of the State of Washington expect when there is an
19	election contest filed and what they deserve when an election

20 contest is filed under our election contest statute, which is 29A

21 . 68.

22

23

24

25

15

Washi ngton.

I have not read the legislative history of our election contest statute. However, I cannot imagine that our ladies and gentlemen of the state Legislature ever contemplated the situation that we find ourselves involved with today where

- 1 the parties and their attorneys have spent not less than  $\sin x$
- 2 months trying to figure out what happened here and trying to
- 3 collect evidence to support the various theories.
- 4 But my sense is after hearing counsel argue the
- 5 various motions that we've had since January, that actually there
- 6 was concern as far back as November of 2004 about this particular
- 7 election and what might happen and what was happening and
- 8 ultimately what did happen.
- 9 The Secretary of State has argued consistently, as
- 10 Mr. Ahearne in a sentence or so argued a few minutes ago, is that
- 11 the Court should allow and perhaps demand here that there be a
- 12 full and complete record of the position taken by both the
- petitioners as well as the intervenors. And as I have often
- 14 actually agreed with Mr. Ahearne's analysis and arguments, I
- 15 agree again.

16	MOTION TO DISMISS - Yes.txt I think although it may be I know Mr. Hamilton is
17	going to think it is a disservice to his clients for the Court to
18	allow this case to go on. I think it would also be a disservice
19	to the petitioners to cut this case off now without requiring
20	both sides to present to this Court everything they have in
21	support of and in opposition to the respective theories that have
22	been advanced by both parties in this case, the evidence the
23	Court perceives is still at issue in this case.
24	And as Mr. Hamilton and Mr. Korrell have pointed out
25	in the arguments, they still and they won't agree as to what the

- 1 law is in this case. And that fortunately or unfortunately is up
- to me to attempt to decide. I'm going to do that actually
- 3 because ultimately the facts in this case, although they are
- 4 disputed, will remain disputed throughout this next week I am
- 5 sure, are going to be sifted through our election contest statute
- 6 and our case law.
- 7 And it is only by that sifting process, sifting the
- 8 facts with the law as it is written, that the Court is going to
- 9 be able to offer any kind of a decision. And in order for that
- 10 decision to be -- I hate to -- I won't. I was going to say fair
- and balanced, but I guess we'd better not say that.
- 12 I'll simply say that both sides deserve, using
- 13 Mr. Ahearne's words, a full and complete analysis not only of the
- 14 Court's findings of fact but also as to the Court's conclusions
- of law. So Mr. Hamilton, I'm going to deny intervenor's motion.
- 16 MR. HAMILTON: Thank you, Your Honor.
- THE COURT: Counsel, Mr. Hamilton, you say there are a Page 53

18	number of auditors here. So give me a starting time this
19	afternoon.
20	MR. HAMILTON: Your Honor, maybe one hour from now, if
21	that's a sufficient break. We can do 45 minutes, but I'm afraid
22	with the number of people
23	MR. AHEARNE: In deference to the auditors, my
24	preference would be 45 minutes so we can hopefully get as many
25	finished today as possible.
56	
1	THE COURT. It is soing to any one hours in defendance to
1	THE COURT: I'm going to say one hour in deference to
2	the court staff. I'm more afraid of them than I am the auditors.
3	2:15 we'll take up.
4	(Recess from 1:15 p.m to
5	
6	
7	
8	
9	
10	